



COMMUNITY & PUBLIC SECTOR UNION STATE PUBLIC SERVICES FEDERATION GROUP

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CPSU Submission on Non-Competes

The CPSU covers workers in the public sector in Commonwealth, State and Territory Governments and has over 120,000 members. The CPSU State Public Service Group covers over 80,000 members who work in state governments, Universities, Schools, Disability Services, and other privatized services in hundreds of occupations from professional, to general skilled workers. The following submission is based on the perspective of our membership and the cases we experience representing these workers.

The CPSU notes the Issues Paper released by Treasury and has answered selected questions.

The CPSU also acknowledges and supports the submissions of the ACTU.

Question 1 and 2

No, as they are provided on a take it or leave basis before, during and often after employment has commenced. They are primarily governed by employer discretion, superior bargaining power and only reviewed by the expensive means of litigation, unavailable for most workers. Employers have the capacity to pay for legal assistance, and also may possibly be able to insure against breaches.

Question 3

Our position is that restraints of trade generally have poor outcomes for workers and the economy with the exceptions below for Senior Executives.

Senior Executive Service

CPSU have noticed in the last decade that there are minimal or no restraints of trade on our Senior Executive Service in some of our state public sectors post-employment. Examples of this include Senior Executive Service being enticed to leave the service in states to start a career for multi-nationals tendering for or having received a tender for a government service in order to privatise the service. This has seen a number of workers' wages and conditions driven down, particularly in regions as workers move from a copied state award to minimum wage modern awards. These ex-SES know the systems and the decision makers.

Potentially departing from other unions, in these circumstances there is a need to restrain the Senior Executive for a period after their service, if provided with adequate compensation. However, at present the monetary compensation or severance pay is not adequate to compensate for non-competition.

Post Termination Employment Restrictions

Current experiences appear to operate inversely on seniority for the appropriate effect of non-compete. For example in NSW government if you are a non-executive and made redundant you cannot work for a contractor or consultant for government contractors without re-payment of redundancy:

*5.3 Re-employment or re-engagement in the NSW Public Service Employees who accept a voluntary redundancy cannot be re-employed or reengaged in any capacity in any NSW public sector agency within the period covered by their severance payment, without first repaying the relevant proportion of their severance pay. This requirement applies to employment or engagement in **any capacity as staff members, contractors, consultants or employees or principals of companies engaged in contracting to a public sector agency.**¹
(emphasis added)*

We believe this is designed to prevent people organizing a redundancy for themselves. However, it is the SES and Treasury that authorize redundancies which offered to the workforce. SES however get a statutory severance payment and do not get the above redundancy policy provisions regardless of cause.

In the former NSW Liberal National Government we have seen a number of SES move to the service of companies contracting and consulting to a public sector agency, without the need to repay redundancy as they have a statutory severance payment. However with this requirement to repay redundancy as a big financial risk for award covered public servants, it is seen as a handbrake for award covered workers to become re-engaged in work that they are skilled to do, in even at different grades.

Question 4

There appears to be minimal argument for lower paid workers to be restrained by non-compete provisions. For Non-Executive workers there is a clear case for a ban similar to that of the pay secrecy provisions. The international experience of providing compensation should be followed if a worker at this level has to maintain the restraint of trade.

Question 5. The CPSU's experience with Fair Work and State Industrial Commissions has seen the ability to resolve issues of restraint of trade, such as inappropriate use of misconduct over secondary employment. The advantage for these forums is that you are actively encouraged to conciliate matters, encouraged to appear without lawyers thus reducing costs for the employer and the worker, and resolve matters within the employment contract. There is more scope in several state jurisdictions for during employment dispute resolution. However, all jurisdictions there is minimal ability to deal with post-employment matters at this stage. This needs to be resolved.

Recommendations

That non-compete clauses are to be banned for lower to middle-income earners.

That the Industrial Relations Commissions (including the Fair Work Commission) are extended jurisdiction to specifically deal with during and post-employment restraints of trade.

¹ NSW Department of Premier and Cabinet, Managing Excess Employees January 2012

Questions 10, 11, 12

There is minimal use of non-disclosure clauses in the state public sector. Where it is used however, is in relation to when a job is terminated in difficult circumstances, such as through workplace conflict, workplace injury, workplace bullying and harassment, protected disclosures and whistleblowing. We have seen legislative progression to prevent sexual harassment being tied up in these agreements, however, we are yet to see this extended to other areas such as corruption, and health and safety. Whistleblowing despite some early efforts by this government remains a problem in the sector. This poses a possible area for improvement so that systems and protections can be improved and exposure of failure to follow statutory duties can be enabled.

Question 13 and 14

In the public sector of our states and our members in privatized services, there are minimal post-employment restraints of trade (see above for SES discussion for exemptions).

However, we have observed that during the employment of public servants, almost the entirety of the service is covered by secondary employment policies that are linked to the code of conduct and conflict of interest policies. These policies are policies of the employer and are often adjudicated by the employer in a subjective manner at the workplace.

The operation of these policies is not open to review and is often resolved via threats or notices of breaches of misconduct under the code of conduct. There is also no obligation on the employer often to complete the secondary employment authorization often placing the worker into a position where they void the new employment offer and acceptance process or breach the public service employment conditions. This affects both national system employees and employees of the state jurisdictions. The main aspect for intervention and review comes when there is a finding of misconduct, which is reviewed through external tribunals after disciplinary determination or termination has occurred. By this stage the employment relationship has been significantly damaged.

Secondary Employment policies have a place and often are used for genuine purposes. In the context of the public service members we represent there are a number of grounds that are included in a secondary employment policy including:

- Risks to health and safety including fatigue
- Professional Codes of Ethics
- Conflicts of Interest such as for law enforcement and regulator workers
- Information Workers and risks of sharing information
- Availability Issues including for emergency service shifts

Other restraints exist for public servants including client information, health information, cabinet in confidence documents, security clearances, processes and documents,

However, it is the application of these policies that is often open to unreasonable, unrealistic and subjective restraints on workers, with minimal opportunity to review by the workers.

The following examples demonstrate how several of these restraints apply.

Government Agency

A worker who worked for a government agency employer had their family company purchase a property that had an existing lease agreement on the property with their employer who leased this space from the family company. The worker took no part in the negotiations of the lease and secondary employment authority was not withheld. There was no conflict of interest as the

employer negotiated with a real estate agent the terms of the contract. That property of the employer was a totally different function.

The employment of the worker and the ownership of the property made no material difference to the outcome of the contract, did not affect the worker's performance or provide an opportunity for the worker's employer to be compromised. The terms of the contract were continued between the employer and the worker's family company. The worker felt that they were withholding permission to continue the lease to try and shake down the worker's company in the next lease renegotiation. We can't comment more than general terms on this case.

Disability Sector

A part time disability worker who worked for many years as a part time worker with set hours in a privatized provider, applied to work for another provider. The secondary employment would have assisted the worker make ends meet and also assist another client with their care in a sector that has a severe worker shortage. The first employer forbade the worker from undertaking the additional work because of alleged conflicts of interest, and the inability to call the worker for additional shifts that they had not been doing, as the worker was on a substantially superior employment condition of the copied state award. This limited the ability of the worker to earn extra income and participate in society and also added to the labour shortage in the sector.

Injured Worker

An injured IT worker working for an emergency service was injured due to psychosocial factors including bullying and was encouraged to return to work through starting up an IT business. The worker established all of the administrative mechanisms to establish the business, which was agreed by the Department's line management, rehabilitation provider in order to get the worker back to work and functioning again. The Department Head's delegate refused to allow secondary employment, initiated disciplinary action to try to undermine the workers compensation claim and the worker deteriorated until they were medically terminated.

A shift worker

A worker who had not been offered a night shift for several years was refused secondary employment because it may inhibit the ability of the worker to work a shift for the employer or pose the risk of fatigue. The same employer in another region would commonly employ workers for multiple shifts up to 36 hours.

Recommendation: The CPSU recommends that the Fair Work Commission and State Industrial Commissions be given the powers to resolve disputes about secondary employment matters prior to matters becoming misconduct.

Secondary Employment Restraints

The CPSU notes that there are genuine times when during an employment contract there may be a need for our members to have certain restrictions placed on their work and conduct outside of work.

Examples of this include where our law enforcement and regulators, people dealing with security sensitive and cabinet information, carers and health workers are required to keep certain information confidential or within a secure group of workers. Some of this information may also have

legislative requirements for ongoing confidentiality such as cabinet documents, court documents and other information.

Work Health and Safety duties can be a factor for our members, especially when our members work in a high-risk environment. Having said this, we have a number of examples where these conditions to prevent secondary employment external to an organization will prevent a worker from working for another employer through secondary employment, only to have these workers work shifts 36 hours straight or never get called for overtime at all.

Examples of where non-compete clauses during work arrangements include predominately secondary employment policies. These are often applied to obfuscate making a decision thus having the worker lose their options of secondary employment, ejected based on unrealistic assumptions

Recommendations

The CPSU recommends that the Fair Work Commission and State Jurisdiction Commissions be given the powers to resolve disputes about all secondary employment matters.

The CPSU recommends that part time, casual workers not be restricted by restraint of trade provisions including secondary employment provisions..

Question 17

No-poach agreements

The contracts with labour hire suppliers may be a type of No-poach agreement. These agreements between host and supplier can cause significant restraints to labour hire workers in the public sector. Often, we are told that an agency will utilise a recruitment agency and labour hire company to hire staff to work as labour hire for a period of time. These staff will later be able to apply for a public service role that pays more for doing the same work through open competition. The recruitment company will often have a clause that the host cannot poach the worker without paying a very large "finders" recruitment fee. This will be despite these workers being trained by the host employer and not by the recruitment agency/labour hire.

Whilst some agencies will pay the fee at considerable cost to the government service they are providing, some selection panels will find mechanisms to prefer other applicants who do not attract the finder's fee. These agreements are between two companies and disadvantage workers from gaining extra pay and conditions if the host is not prepared to pay the fee. The worker cannot take it or leave it.

Recommendation

That recruitment fees in a labour hire context should have a maximum lifespan, (say 2 months from start of labour hire contract), and not have any effect when a worker freely applies for an open recruitment process available to the public.

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